Bruton Co
with compts.
Samuel C. Brown

1863

In the District Court of the United States, for the Eastern District of Pennsylvania.

United States v. Naval Stores.	In Admiralty Prize.

After the defeat of the rebel forces, some miles below the town of Newbern, N. C., on the 14th of last March, the naval forces of the United States ascended the river and took possession of the place. The property described in the libels was seized on the wharves and in adjoining enclosures. It should be added that the engagement took place at some distance from the town of Newbern itself. (Com. Rowan's Report, Rebellion Record, Part p. .)

The first question which arises may be stated as follows: Is this property liable to condemnation as prize, according to the laws of war as accepted by the United States; assuming that those laws are applicable to the hostile organization in the rebellious States to the same extent as if they were foreign enemies?

It is admitted, that up to the end of the last century, property on land was subject to seizure and condemnation; but it is submitted, that the laws of war have been modified by usage and consent, and such modifications must be recognized in a Court of Prize.

The Antelope, 10 Wheat, 67 (*præsertim*, pp. 76 and 125); the Fortuna, 1 Dodson; Le Louis, 2 Dodson; Amedie, 1 Acton; Eugenie, 2 Mason; Vattel, Intro., §§ 25, 27, 56, b. 1, ch. 23, § 293; Burl, 165; Martens, l, 9, § 5, l. 11, § 1; United States *v.* Smith, 5 Wheat, 160.

It cannot, perhaps, be clearly established that property on

land is no longer liable to seizure according to the laws of nations as interpreted by foreign governments. In a speech delivered by Mr. Phillimore, in the House of Commons, during the Russian war (Hansard, Vol. 134, p. 1093), he denied that any such rule had been generally adopted, and some Continental publicists hold like views; but such captures, if recently made, have not been submitted to the adjudication of the courts, and it is difficult to assign any limits to the discretion of a Government engaged in conducting a war. The massacre at Jaffa is defended by some writers on the score of necessity; and, granting the facts asserted by Napoleon's apologists, it is not easy to refute their conclusions; but the right of absolute disposal over his prisoners, even to ordering their execution, with which a general is vested, would not be respected for a moment in a Prize Court. When its jurisdiction is invoked, the plenary power of the conqueror is lost. And this, perhaps, is the answer to the case of Lord Camden (1 and 2 Hy. Blackstone), relied upon by the counsel for the United States. The English Government may suspend or annul the laws of war as interpreted by its own courts, and an express Commission may legalize a capture, which would have otherwise been unlawful. Certainly, some distinction has been recognized. In the case of Thorshaven, Edw. 113, Lord Stowell said, "It is hardly necessary for me to enter into the other topics which have been thrown out in the argument; but, as they have been touched upon, I will just state my opinion upon one point, which is, that the commissions of privateers do not extend to the capture of private property upon land; *that is a right which is not granted even to the king's ships.* The words of the third section of the Prize Act extend only to the capture, by any of his majesty's ships, 'of any fortress upon the land, or any arms, ammunition, stores of war, goods, merchandize, and treasure belonging to the State, or to any public trading company of the enemies of the crown of Great Britain upon the land.' Here, then, the interests of the king's cruisers are expressly limited with respect to the property in which the captors can acquire any interest of their own, the State still reserving to

itself all private property, in order that no temptation might be held out for unauthorized expeditions against the subjects of the enemy on land. With regard to private ships of war, the Lords of the Admiralty are empowered by the ninth section to issue letters of marque to the commanders of any such ships or vessels. For what purpose? Why, 'for the attacking and taking any place or fortress upon the land, or any ship or vessel, arms, ammunition, stores of war, goods or merchandize, belonging to or possessed by any of his majesty's enemies.' Where? 'In any sea, creek, river, or haven.' I perfectly well recollect that it was the intention of those who brought this bill into Parliament, that privateers should not be allowed to make depredation upon the coasts of the enemy for the purpose of plundering individuals, for which reason they were restricted to fortified places and fortresses, and to property water-borne." In this case, it may be remarked that Lord Stowell said that he would "reserve the consideration of the private property till it is claimed."

Chancellor Kent, in his Commentaries, says, "The general usage now is not to touch private property upon land, without making compensation, unless in special cases, or when captured in places carried by storm, and which repelled all the overtures for a capitulation." Vol. I. p. 92, &c.

In the case of the Emilia, 18 Jur. N. S. 703 (1 Spinks P. C. 18), Dr. Lushington observed, "If property was on land, according to ancient law, it was seizable; but that rigor was afterwards relaxed. I believe no instance has occurred, from the time of the American War to the present day, in which property on land was subject to search or seizure; but, no doubt, it would be competent to the authority of the crown if it thought fit."

The learned writer of the article in the June number of the Law Reporter, on "The rightful power of Congress to confiscate and emancipate,"—said to be Caleb Cushing,—asserts that "the distinction between the confiscation of public and private property in war, is now firmly established in the law of nations, and adds, "All respectable writers of modern times agree in

exempting private property, on land, from confiscation. Heffter, § 133; Halleck, p. 457; Wheaton, p. 420. Isambert, a distinguished French writer on International Law, lays down the rule as follows:—"Nous pensons avec Grotius qu'on acquiert par une guerre juste autant de choses qu'il en faut pour indemniser completement les frais de la guerre; mail il n'est pas vrai que par le droit des gens on acquiert le droit de la proprieté entière des biens des sujets." Annales Politiques et Diplomat., Intro. (Par. 1823) p. 115. Zacharia 40, B. Von Staate, IV. p. 102, is yet more distinct upon this question: "The private property of enemy's subjects is under the protection of the law of nations; it is only liable to seizure in exceptional cases, and where circumstances render the purpose of the war unattainable in any other way." Boston Law Rep., June, 1862, 480.

Hautefeuille, it is true, contends for the old rule in all its rigor, but, except in Asia or Africa, European Governments have, sedulously for the last half century, repudiated it in theory, and discarded it in practice.

Thus, during the Crimean war, the City of Odessa was taken by the allied fleets. In his dispatch, read to the House of Lords, by the Earl of Clarendon, (Hansard, 132, 1282,) Admiral Dundas narrates the destruction of the public property, but adds, "The mole of Quarantine, the foreign ships, and the city itself have not been injured, great care having been taken with respect to private and neutral property." The policy of the allied governments was thus enunciated by the Duke of Newcastle, (Hansard, vol. 133, p. 144,) "It is the strong feeling and desire of the Government, that in the conduct of this war, private and neutral property should be, as far as possible, respected, and as little destruction should be caused to that property as is consistent with the effectual carrying on of the operations;" and no deviations from that policy were permitted during the war. The destruction of Naval stores at Uleaborg was justified, on the plea of military necessity. (Hansard, vol. 134, p. 911.)

That such relaxation of the laws of war will, in time, be

universally adopted, may be fairly argued, from the well-known views of military men and historians, as to the inexpediency of making such captures. Those laws are based upon necessity or expediency, and that cannot remain a rule of capture which the highest authorities pronounce unnecessary and impolitic.

Wellington's Sup. Desp., VI., 298 and 312; Wellington's Sup. Desp., VIII., 510; Napier's Peninsular War, I., 219, and 360; Alison's History, VII., p. ——; Napoleon, Memoires de St. Helène.

Granting, however, that an English Prize Court could not, consistently, refuse to condemn property of this kind, it is obvious that there is no such difficulty here.

In Brown *v.* United States, 8, Cranch 110, the Supreme Court of the United States decided that enemy's property, even though water-borne, when found within the limits of this country at the breaking out of hostilities, was not subject to condemnation without a special Act of Congress. Marshall, C. J., thus sums up the judgment of the Court: "It appears to the Court, that the power of confiscating enemy's property is in the legislature, and that the legislature has not yet decided its will to confiscate property which was within our territory at the declaration of war," and the reason given for the decision was that, "The Constitution of the United States was framed at a time when this rule, introduced by commerce in favor of moderation and humanity, was received throughout the civilized world." The full force of this decision can only be estimated by a careful study of Judge Story's decision in the Court below; 1 Gallison, and his dissenting opinion in the Supreme Court. In United States *v.* Percheman, 7, Peters, 86, the same Court again acknowledged the binding force of the modifications of belligerent rights, which have been introduced by general usage and consent. Marshall, C. J., said, "It may not be unworthy of remark, that it is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. *The modern usage of nations, which has become law*, would be violated; that sense of justice and of right, which is acknowledged and felt by the

whole civilized world, would be outraged, if private property should be generally confiscated, and private rights annulled."

The restoration of a case of paintings and prints by Dr. Croke, in the case of the Marquis de Somerueles, Stewart's Vice-Adm. Rep., 482, rests on no higher authority than a similar usage in respect to works of art, and the same may be said of the restoration of books to the University of N. C., by this Court.

If it can be shown, therefore, that our Government has committed itself by its diplomacy, or even the acts of its Executive, in reference to private property upon land, it is submitted that restoration ought to be decreed in this case. Upon this point there is abundant authority. At the time Vice-Admiral Cockburn and Admiral Cochrane were committing depredations upon the coasts of the Chesapeake and Potomac—making captures in every respect like the one now under consideration—our Government made the most energetic protests. Mr. Madison, in his message upon the subject, (Benton's Abridgt., Vol. V., p. 6,) speaks of them as "equally forbidden by respect for national character, and by the established rules of civilized warfare." The House of Representatives (Ib., pp. 69 and 70) adopted a report condemning them as "British barbarities;" and both branches of Congress *repudiated* alleged outrages of a similar character in Canada.

When the Treaty of Ghent was made, partial compensation for the private property seized on land was demanded, and obtained. We have not been able to find the instructions given to the Commissioners appointed to negotiate the treaty, but in the subsequent negotiations, our representatives claimed reparation, upon the broad principle that private property on land was not liable to capture.

American State Papers, Foreign Relations, Vol. IV., 117, &c. Boston Law Reporter, June, 1862. Wheaton's Law of Nations, 397, &c.

In his letter to the Secretary of State, dated August 22d, 1815, John Quincy Adams narrates his conversation with Lord Castlereagh, in the course of which he had said, "Our object

was the restoration of all property which, by the usages of war among civilized nations, ought not to have been taken. All private property on shore was of that description: it was entitled by the laws of war to exemption from capture—slaves were private property." American State Papers, XI., 211.

In a despatch, dated July 5th, 1820, addressed to Mr. Middleton, our Minister to Russia, Mr. Adams again writes: "But private property was not, and could not be, lawfully taken with the place. With the exception of maritime captures, private property, in captured places, is, by the laws of nations, respected. None could be lawfully taken—and the stipulation was, that none should be carried away."

The position then taken by our government has always been maintained. The Treaty negotiated in 1784, by John Adams, Benjamin Franklin, and Thomas Jefferson, with Prussia, contained a stipulation not to molest non-combatants. Kent I., p, 92, (note.) And by the Treaty of 1783, with England, both governments agreed not to confiscate private debts. So, too, when invited to unite with the European governments, in the adoption of the Declaration of the Congress at Paris, of 1856; it refused, unless the first principle of the Declaration should be amended, by adding thereto these words: "And that the private property of the subjects or citizens of a belligerent on the high seas, shall be exempted from seizure by public armed vessels of the other belligerent, except it be contraband."

In his despatch to the Count de Sartiges, dated July 28th, 1856, (Message and Doc. 1856–7, Part I., p. 35,) Mr. Marcy thus expressed the views of his government: "The prevalence of Christianity, and the progress of civilization have greatly mitigated the severity of the ancient mode of prosecuting hostilities. War is now an affair of governments. It is the public authority which makes and carries on the war; individuals are not permitted to take part in it, unless authorized to do so by their government. It is a generally received rule of modern warfare, so far, at least, as operations upon land are concerned, that the persons and effects of non-combatants are to be respected." * * * "It is fair to presume, that the

strong desire to ameliorate the severe usages of war, by exempting private property upon the ocean from hostile seizure, to the extent it is usually exempted on land, was the chief inducement which led to the declaration of the Congress at Paris, that 'privateering is, and remains, abolished.' The undersigned is directed by the President to say, that to this principle of exempting private property upon the ocean, as well as upon the land, applied without restriction, he yields a most ready and willing assent." The course of the Executive in the discussion was fully sustained by Congress. See Congressional Globe for 1856–7.

It may be added, that if any distinction whatever is to be made, between property at sea and on land, the fact that this capture was made by the naval forces is unimportant. It was not the *duty* of the captors to make it, as it would have been to improve every opportunity for destroying the enemy's commerce; and at the time the English Prize Act of 45 Geo. III. was passed, steamships had not been invented. It was, then, a received maxim of warfare, that fortifications could always be constructed sufficiently strong to stop a fleet; and the only instances in which private property on land was made subject to seizure, was when connected with a fortress, or belonging to a public trading company. Now, however, almost every town or city of importance, in this country or in Europe, is on navigable waters, and within easy reach of iron-clad gunboats. The observation made by General Blucher, when entering London, ("*was für ein raub*,") is usually classed with his proposal to assassinate Napoleon, and his destruction of the shade trees in the Champs Elyseès, or his wish to demolish the Pont de Jena; but if this libel is sustained, modern warfare will become as barbarous as it was in the days of Mummius.

II. Is it liable to condemnation as the property of one, living at the time of capture in the State of North Carolina?

It is to be observed that the right to confiscate the property of rebels, so far as it overrides the laws which protect them as citizens, is solely the offspring of necessity. Residence in a rebellious State makes one *constructively* hostile, and he is not

allowed to rebut the fiction of the law because "those predatory maritime hostilities which the law of war sanctions"—and which must be waged in order to bring the war to a speedy and satisfactory end—"could not be prosecuted with effect if this rule were not applied with inexorable rigor." The General Parkhill, p. 5. The condemnation was in that case justified solely on the ground that "one of the purposes of naval warfare is *to diminish the power of hostile governments* or *other hostile organizations*." The object proposed is "to diminish the wealth" of places in hostile occupation, and "thus reduce the power of their hostile rulers." This is not the principle by which naval captures in a foreign war are justified. It is true that it is often said that "there is no such thing as a war for arms and a peace for commerce" (8 D. & E. 548), but so far as the subjects of the two countries are concerned, every citizen of the one is an enemy of every citizen of the other; and formerly, they might, as enemies, despoil and destroy one another without any other warrant than a declaration of war. (The Parkhill, p. 20.) But here (Ib. pp. 5 and 6) it is not the character of the person, but of his residence which condemns his property. The temporary subjection of a part of the country by a rebellious organization has precisely the same effect as a conquest by a foreign enemy. The Bella Guidita, 1 Rob. 207. The Rebecca, Hay & Marriott, 212.

It was indeed said in The Marathon, that as against rebels a government was invested with the same belligerent rights as against a foreign enemy; but the rule can only be meant to apply to the rebellious organization, and it was not necessary to the decision of the case that such a rule should be established. In several of the cases in Hay & Marriott, property was restored to the owner, who had sailed in the same vessel with it from the Colonies, and where the claimant personally appeared in Court, condemnation was never decreed, except where a restoration would have possibly screened the *commerce* of the enemy. The limitations of the rule are well illustrated in the case of The Diana, 5 Rob. 65. There, Lord Stowell restored the property of British subjects who had settled in

Demarara, while in British possession, and had shipped their goods, after the colony had been ceded again to Holland, and while peace still prevailed, upon the ground that the reconquest of the colony, before the decree, though after the capture, "rendered them not only in their property, but territorially, as much the subjects of this country as the inhabitants of any part of it;" so that, "at the time when this Court is called upon to decide on the claim, the proprietors are again restored to their British character, and are redintegrated subjects of this country. Under all these circumstances, I should betray a very obtuse sense of what is absurd and unjust, if I did not feel it highly reasonable that they should be admitted to their *jus posliminii*, and be held entitled to the protection of British subjects." In other words, the Courts have restored the property wherever there was no inexorable and imperative necessity for its confiscation. *Cessante ratione, cessat ipsa lex.*

This capture, however, has no commercial character, and it is not necessary to rely upon the exceptional cases, in which the loyal claimants have appeared in person before the Court. The taking of Newbern was a reconquest of so much of the national territory. Its former hostile occupation can leave no taint upon its inhabitants. Their national character has not been changed. The Gerasimo, 3 Phill. xliii. (all the English authorities are collected and discussed in the opinion of the Privy Council in this case); Boyle *et al.*; 9 Cranch, 195; Fleming *v.* Page, 9 How. 614; Cross *v.* Harrison, 16 How. 164. Upon a reconquest there is an immediate restoration of the authority of the government, and it would be absurd to claim and exercise the belligerent rights of *destruction*, when the object is *protection*. This is very clearly established by the case of The Progress, Edw. 219, in which salvage was refused to the British Army for its services in rescuing Portuguese property in Oporto. In the course of his opinion, Lord Stowell discussed "*the case of a native army rescuing a seaport of its own country from the possession of the enemy.* For instance, if by a misfortune, which it is to be hoped will never happen, the enemy should get possession of London, and be afterwards

expelled by a British army, whether that army would be entitled to a salvage on water-borne property in the port of London recovered by its exertions? I am of opinion it would not; the native army employed by the state, and paid by the state for the national defence, if its efforts were successful, would be the means of reinstating the sovereign in his rights of sovereignty, and his subjects would be entitled to receive their property back as it stood before the irruption of the enemy. The whole would revert *instanter* to its owners. * * * This is a position in which I am fortified by the general practice of mankind, and the practice of mankind forms one great branch of the law of nations; the history of the world has produced no instance that I recollect in which a claim for salvage for the rescue of a capital city by the native army has been made and allowed, and therefore, on principle and on practice, I am warranted in concluding that the claim would not be sustainable."

The case before the Court is precisely "the case put" by Lord Stowell. Newbern was a seaport temporarily occupied by an armed rebellious organization, which is to be regarded in the light of a foreign enemy. It has been rescued by the army of the nation; the sovereignty of the government has been reinstated, and the people are entitled to receive and hold their property as it stood before the irruption of the rebellious forces. The proclamation of General Burnside and Com. Goldsborough, and the legislation of Congress during 1861 and 1862, prove that the Government regards this rebellion as the work of individuals, and whenever their power is broken, the Constitution and the laws are re-established. No other principle can be laid down that will be consistent with the Confiscation Act, and this Court is bound by the decision of the Legislature or Executive. (U. S. *v.* Klintock, 5 Wheat.)

Indeed, no title is acquired to neutral property in the towns or territories of the enemy, though it is always presumed to be enemy's property till the contrary is proved. Grot. iii. 6, v. vi.; iii. 6, xxvi. 1; and in this instance, as the war-making power is a limited one, and can be exercised against the people who delegated it, and in violation of the limitations imposed by other

provisions of the Constitution only so far as there is a clear necessity therefor, the demand of the citizen for the protection of the laws must be conceded, unless such concession will thwart the Government in the legitimate exercise of the war power. But this is avowedly a war of deliverance, and it would be absurd to make booty of the property of those whom it is pretending to befriend.

It must be clear, also, that a belligerent confiscation, plainly incompatible with the principles of the municipal law, cannot be decreed at a time when the claimant is within the jurisdiction of the civil courts, and United States *v.* Hayward, 2 Gall. 501, S. C., United States *v.* Rice, 4 Wheat., decide that a violation of the laws of the United States by a citizen thereof, while his residence is in the possession of a foreign power, cannot be punished after a reconquest by the United States; and, *a fortiori*, no penalty can be imposed, after such reoccupation, because of the mere fact of residence. To adopt any other doctrine would be to disregard the equity, if not the letter, of statute of 11 H. 7, c. 1, and to over-rule the numerous authorities decided in accordance with the common-law principle, which it enunciates. No inquiry, therefore, need be made as to the loyalty or disloyalty of the claimants during the time, the Confederate Government was a *de facto* government in possession of the town of Newbern. The Parkhill, p. 11.

Finally, it may be added, that the rules of war must always be construed in accordance with the purposes and objects of the war. So far as they may be promotive of the end sought, they are applicable; but they cannot be enforced where their application would defeat the very objects for which the war is waged. The objects of this war are pre-eminently to preserve and restore—not to destroy. They are to preserve the Union and the public property of the United States, and to restore the authority of the Government where it has been overthrown, and to restore the people of the insurrectionary districts and States to the protection of the Government, both as regards their persons and property. By the rules of war, the rights

of conquest apply to the territory and persons of the conquered. For the purpose of reducing and destroying an armed rebellious organization, no doubt the rules of war can be applied to the territory in which such rebellious organization is found, so far as may be requisite for effecting that end. But, in so doing, the right of applying those rules must cease so soon as the rebellious organization ceases. A nation may acquire the territory of an alien enemy by conquest; but it cannot acquire its own territory by conquest. So soon as the rebellion or armed organization is subdued, *eo instanti*, the place is as it was before the rebellion; and so with the persons inhabiting it, *for the rebellion, in the contemplation of the law, is something apart and distinct from the citizens, who may be, for the time, coerced by and subjected to it.* The Government is remitted to its authority, and the person to his right of protection. Each citizen of the rebellious district is entitled to call on the Government for the protection of his rights; but it would be a strange anomaly, if, when the Government, by force of arms, places itself in a position to perform its duty toward such citizen, it proceeded to strip him of all his property. After reducing a town occupied by the rebellious power, in order to protect the inhabitants—and that must be the object, as allegiance cannot be claimed where protection is not given, and it cannot be the duty of the citizen to aid in overthrowing the rebellion, so as to be enabled to render allegiance, if the Government do not assail the rebellion with a view, and for the purpose, of affording protection—the destruction of their property would be an act of self-stultification; and if their property cannot be destroyed, it cannot be the subject of capture as prize, for that is as much destruction to the owners as if consumed by fire.

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